IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MELISSA SHEFFIELD,	)	NO. 61238-7-I
	)	
Appellant,	)	
	)	
	)	UNPUBLISHED OPINION
	)	
GOODYEAR TIRE & RUBBER CO. and RANDY REICH,	)	
	)	
	)	
Respondents.	)	FILED: August 24, 2009

BECKER, J. — This is an employment discrimination action based on claims of retaliation and disability. After a jury returned a verdict of $4.3 million in damages for the employee, a juror revealed that he had researched the employer's annual earnings on the internet and disclosed the information to fellow jurors while they were deliberating on damages. The court correctly ordered a new trial on damages because the information about earnings was extrinsic evidence that the employer had no opportunity to rebut. We affirm that

order and leave in place the verdict of liability.

FACTS

According to evidence presented in the plaintiff's case, Melissa Sheffield became the store manager at respondent Goodyear Tire & Rubber Company's Northgate store in 1999 after working there for five years and being promoted several times. In fall 2002, she publicly "came out" to her colleagues by bringing her girlfriend to a management dinner.

In January 2003, Sheffield sought medical care for a workplace back injury. Her treating physician, Dr. David Kuechle, recommended that she take time off for recovery. Sheffield testified that although she was in considerable pain, she continued to work.

On February 17, 2003, Sheffield received a written disciplinary notice from Goodyear alleging several billing irregularities discovered in the store. By letter dated February 18, 2003, she committed to correcting the irregularities, and she understood that her district manager, Randy Reich, considered the matter resolved.[1]

Also on February 18, 2003, Dr. Kuechle gave Sheffield a doctor's note stating that she was "not able to work for 2 weeks" due to the back injury. Sheffield testified that when she gave this information to district manager Reich,

[1] Verbatim Report of Proceedings (VRP) (October 29, 2007) at 186.

he said, "I don't want to hear about that. There is nobody to work your store."[2]

On February 19, 2003, Reich assigned David Johnson to be the new service manager in Sheffield's store. Sheffield testified that she was supposed to be flat on her back and not working at this time due to her back problems, but she continued to work varying hours every day because the work needed to get done. One reason she came in was that Johnson told her he lived far away from the store and could not be there to close it.[3]

Soon after Johnson began work, he told Sheffield that he "had heard about me and knew that I was gay and did not like gay people, hated gay people."[4] Sheffield told Reich about Johnson's remark and asked him to replace Johnson with someone else. According to Sheffield, Reich responded, "you are not working. So I am not going to address this until you are back to work."[5] He maintained this response even after Sheffield told him that she was still working at the store and did not want to have to work with Johnson.

Sheffield testified that one night, she came in to close the store for Johnson and found him sitting at his desk, boasting about bringing a gun to work. She told him twice that it was against Goodyear's policy to have guns on

[2] VRP (October 29, 2007) at 161.
[3] VRP (October 29, 2007) at 188.
[4] VRP (October 29, 2007) at 188-89.
[5] VRP (October 29, 2007) at 189.

the property. Johnson finally turned around toward Sheffield and said, "I will tell you right now, that I am carrying a gun. If you make me mad, I am going to pull it out and urinate all over you."[6] Sheffield reported this to Reich the next morning and his only response was, "you are not working in the store. There is nothing that I am going to do about it until you come back."[7]

On March 7, 2003, Sheffield reported the incident with Johnson to David Newsome, a Goodyear Human Resources representative. After becoming aware of Sheffield's report to Newsome, Reich called Sheffield and directed her not to go to the store when Johnson was there; she could go in at night and do paperwork. Sheffield complied with this directive. Reich informed Sheffield some time later that there would be an independent investigation and in the meantime, she was not to be in the store at all. Meanwhile, Johnson would continue working.[8] Goodyear claims that Sheffield was on leave for her back injury during this time, while Sheffield testified that she was ready to go back to work with some restrictions.

In late March 2003, Goodyear referred the investigation of Johnson to an outside agency. According to the investigation report, when Johnson was interviewed he stated that Sheffield was openly gay and had engaged in "French

[6] VRP (October 29, 2007) at 191.
[7] VRP (October 29, 2007) at 191.
[8] VRP (October 29, 2007) at 196.

kissing" at work with her girlfriend. No other person interviewed corroborated his remark about the kissing. Johnson's "gun" comment, however, was corroborated by a witness.[9]

In May 2003, according to Sheffield, Reich called and told her that if she would drop her complaint against Johnson and agree to work with him, she could return to work. Sheffield said she considered Johnson threatening and she could not work with him. Reich said, "in that case there is nothing that I can do for you."[10]

Soon thereafter, Reich called Sheffield and told her that Johnson had been fired. Sheffield asked Reich when she could go back to work. Reich responded that there would be a telephone call the next day. The next day, Reich and Liz Butler-McElroy, a human resources manager, called Sheffield. They told her the investigation was now complete and not only did it result in the firing of Johnson, but also it had raised concerns about the allegations against Sheffield of "inappropriate kissing" and billing irregularities.[11] They told Sheffield she was being demoted to assistant store manager in a different store in Bothell. Butler-McElroy and Reich testified that the reason for the demotion was that Sheffield had purchased an engine a year earlier for her daughter without a

[9] Plaintiff Exhibit 85.
[10] VRP (October 29, 2007) at 202.
[11] VRP (October 29, 2007) at 204-05.

proper invoice.

Meanwhile, Sheffield's treatment for the back injury was progressing, and there is evidence that her doctor considered her able to work again as a store manager in May 2003. After Sheffield's demotion, her doctor restricted her to two hours per day because her new position was essentially a sales person job that involved too much standing. Sheffield worked at the Bothell store for about five months under the two-hour restriction. In October 2003, Reich told her she was to stay home until she was able to work at least five or six hours per day and then he would put her back to work. Goodyear placed Sheffield on full medical leave. She entered a full time vocational rehabilitation program through the Department of Labor & Industries with the hope of returning to Goodyear as a store manager. Eventually, she completed a pain management program. Her discharge report in March 2005 stated that she was medically stable and able to return to work in the light work category, and could perform the store manager job "with reasonable accommodations."[12] Sheffield's vocational rehabilitation counselor, Jodi Easely, informed Goodyear of Sheffield's status in March 2005 and asked if any work options existed for Sheffield in the company. Goodyear responded that there were none available that could accommodate her restrictions. The parties agree that at this point, Sheffield's employment

[12] Plaintiff Exhibit 27.

relationship with Goodyear was terminated.

In April 2006, Sheffield, through counsel, requested a copy of her personnel file from Goodyear. The district manager at first refused but eventually provided it to her at the direction of the Human Resources Department.

In May 2006, Sheffield brought suit against Goodyear. Her primary claim was that the defendant unlawfully demoted her from store manager to assistant store manager in May 2003 in retaliation for her complaints about discrimination based on her sexual orientation. She also claimed that Goodyear failed to reasonably accommodate the disability she experienced as a result of the back injury. In addition, she made a claim for denial of access to her personnel file.

On October 24, 2007, motions in limine were argued and jury selection began. At the close of plaintiff's case and again at the close of the evidence, Goodyear moved for judgment as a matter of law.

On November 8, 2007, the jury returned a verdict in Sheffield's favor on all claims. On the claims of retaliation and failure to accommodate, the jury awarded economic damages of $318,344, lost future wages and benefits of $40,622, and emotional distress damages of $4 million. Damages for the denial of access to her personnel file were set at $500.

After the jury rendered its verdict, the presiding juror, Thomas Thokey,

admitted in a written declaration that he had researched Goodyear's earnings on the Internet and had mentioned the financial information to fellow jurors during deliberations:

> 3. After the jury had found that Goodyear was liable, we were faced with the task of identifying an emotional distress damages award. Using Yahoo Finance or Google Finance, I was able to determine that The Goodyear Company had a market capitalization of about $6 billion and a P/E (price to earning) ratio of about 30. This means that the Goodyear Company has earnings of roughly $200,000,000. Since no guidance had been provided to the jury for determining an amount to award, we needed to start by discussing some "ball parks." Mr. Johnson argued that an award should be both "significant to Ms. Sheffield" and "significant to Goodyear." We knew about Ms. Sheffield's financial situation, but there was no way to determine "significant to Goodyear" without knowing Goodyear's financial situation. I presented this information to the jury as a number to consider in the deliberations regarding the award of emotional distress damages.
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> 4. Initially, I suggested that 1% of these earnings would be about $2,000,000, and I asked the question, "Would 1% be significant?" I tried to make it very clear to the jury that this particular number was not one that I was putting up for consideration; but rather, it was a number, along with Ms. Sheffield's financial situation, to be considered as part of the award. I also tried to make it clear that the number was very rough. I do not believe that the subject of the award as a percentage of Goodyear's earnings was mentioned again after the initial comment.[13]

Goodyear moved for a new trial on the grounds that Mr. Thokey's actions constituted juror misconduct.

On January 31, 2008, the court ordered a new trial only on damages,

[13] Clerk's Papers at 1084-86.

leaving the jury's verdict of liability intact.

Sheffield appeals, contending that the jury's verdict on damages must be reinstated. Goodyear cross-appeals and contends that the liability verdict must be reversed due to trial errors.

Extrinsic Evidence

Sheffield's appeal raises a single assignment of error: the trial court's decision to grant a new trial on damages based on juror Thokey's discussion during jury deliberations of his research into Goodyear's earnings

Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court. The decision of the trial court will not be reversed on appeal unless the court abused its discretion. Breckenridge v. Valley General Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003).

A jury verdict will not be set aside based on evidence that inheres in the verdict. Breckenridge, 150 Wn.2d at 204-05. Evidence inheres in the verdict to the extent that it discloses the thought process of a juror individually or of the jurors collectively. If evidence is wholly outside the evidence received at trial, it is "novel or extrinsic," and a jury verdict will be set aside if such evidence affected the verdict. Loeffelholz v. Citizens for Leaders with Ethics and Accountability Now, 119 Wn. App. 665, 681, 82 P.3d 1199 (2004). A statement derived from the "personal life experiences" of a juror does not constitute

extrinsic evidence. Breckenridge, 150 Wn.2d at 204.

There is no dispute that Thokey learned about Goodyear's annual earnings from a source outside of his personal experience and that no such evidence was introduced at trial. Indeed, there was no instruction on damages that would have made Goodyear's earnings relevant. Nevertheless, after the jury found Goodyear liable, Thokey, according to his affidavit, deliberately searched for the information on the Internet and shared it with the intention of influencing the jury's assessment of damages. The information he obtained was "evidence not presented by the parties at trial, which the defendants had an opportunity to rebut and the relevance of which they had no chance to argue." Halverson v. Anderson, 82 Wn.2d 746, 748, 513 P.2d 827 (1973).

Sheffield argues that the information is not extrinsic evidence because it is "common knowledge" that a company as large as Goodyear must earn a lot of money. But although the jurors might be expected to know that Goodyear is a big company, specific financial information about earnings and net income is not a matter of common knowledge. Specific information about earning capacity unsupported by the trial record is extrinsic evidence. Loeffelholz, 119 Wn. App. at 681-83.

In Loeffelholz, a sheriff's deputy and county sued the defendants for defamation. The jury returned a verdict for the plaintiffs. The trial court granted

a new trial on the issue of damages when it emerged that a juror, during deliberations, had provided specific estimates of the deputy's average salary. Loeffelholz, 119 Wn. App. at 679. This court held that the trial court did not err. The juror had "placed before his fellow jurors salary and retirement information that was wholly outside the evidence and not subject to scrutiny by either party. The trial court did not abuse its discretion by deciding that this information did not inhere in the verdict; that the information affected the verdict; and that a new trial should be ordered on damages." Loeffelholz, 119 Wn. App. at 683.

This case is like Halverson and Loeffelholz. The information provided by Thokey was extrinsic evidence.

To determine whether the introduction of extrinsic evidence warrants a new trial, the court must make an objective inquiry to determine whether there are reasonable grounds to believe a party has been prejudiced. Richards v. Overlake Hospital Medical Center, 59 Wn. App. 266, 273, 796 P.2d 737 (1990). Sheffield points out that seven out of 10 jurors who voted for the damages award stated they did not hear or could not recall the details of Thokey's remarks. And Thokey himself did not join in the verdict. But the jurors' own statements do not clearly resolve doubt by an objective test. Halverson states that it is up to the trial court to decide the probable effect of the information upon the verdict:

> It is not for the juror to say what effect the remarks may have had upon his verdict, but he may state facts, and from them the court

> will determine what was the probable effect upon the verdict. It is for the court to say whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of the jurors.
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> . . .
>
> The effect which this evidence may have had upon the jury was a question which was properly determined in the sound discretion of the trial court which had observed all the witnesses and the trial proceedings and had in mind the evidence which had been presented. If the trial court had any doubt that the misconduct affected the verdict, it was obliged to resolve that doubt in favor of granting a new trial.

Halverson, 82 Wn.2d at 749, 752. Following Halverson, we conclude the trial court acted within its discretion in deciding that the information affected the verdict and that a new trial on damages should be ordered.

Sheffield contends there is at least no basis to retry economic damages. She says that the jury's calculation of her economic damages would not have been directly affected by the information about Goodyear's earnings considering that Thokey presented the information as bearing on the issue of damages for emotional distress. In ordering retrial, the court reasoned that the jury should have the opportunity to comprehend the complete picture of the totality of all the damages, economic as well as non-economic, in order to have a full context for considering the possible extent of emotional distress damages. "Solely focusing on emotional distress damages would prevent the jury from fully evaluating what economic factors may have caused or influenced any emotional distress that may have occurred."[14] We find that the court's decision rested on tenable

grounds and conclude there was no abuse of discretion.

Cross-Appeal

We now discuss the rulings to which Goodyear has assigned error. We find no reversible error. This was a trial in which the parties, over a period of two weeks and through a dozen or more witnesses, ably presented two competing versions of the relevant events. Many of Goodyear's arguments lack merit either because they rely on a version of the facts that the jury was entitled to reject or because they were not preserved by timely objection.

After-Acquired Evidence

Goodyear learned through discovery that Sheffield had made copies of certain Goodyear documents while she was store manager and had kept them at home. Goodyear asserted that this evidence could be used to limit Sheffield's damages because the retention of such documents breached a confidentiality agreement and it supported the defense of after acquired evidence of employee misconduct. Sheffield moved in limine to exclude the evidence. The trial court granted the motion under ER 403 as having scant relevance that was outweighed by potential prejudice.[15] Goodyear assigns error to this ruling but does not explain why it is wrong. The offer of proof submitted by Goodyear, a portion of Sheffield's deposition, confirms the trial court's judgment that the

[14] Order, January 31, 2008, Clerk's Papers at 1171-75.
[15] VRP (October 24, 2007) at 27.

evidence had very little weight.

Alleged errors insufficiently argued need not be reviewed. Smith v. King, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986). For the same reason, we decline to review Goodyear's argument that the court erred by refusing to instruct the jury on the affirmative defense of after-acquired evidence of misconduct.

Collateral Source Rule

Goodyear contends the court erred by using the collateral source rule to exclude evidence of the workers' compensation and unemployment compensation benefits Sheffield received after being demoted.

We review an order excluding evidence for an abuse of discretion. Hizey v. Carpenter, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). The collateral source rule precludes a defendant from offsetting the plaintiff's damages with evidence of payments received by the plaintiff from a source independent of the defendant, for the same injury caused by the defendant. Ciminski v. SCI Corp., 90 Wn.2d 802, 804, 585 P.2d 1182 (1978). But an offset for workers compensation benefits may be permitted where the benefits were received for a different, unrelated injury. In Wheeler v. Catholic Archdiocese, 124 Wn.2d 634, 880 P.2d 29 (1994), the plaintiff collected worker's compensation benefits due to

an on-the-job injury, and then later received a jury award of damages for employment discrimination. The court held that "since compensation was made for two different injuries, the collateral source rule has no application under the facts of this case." Wheeler, 124 Wn.2d at 641.

Relying on Wheeler, Goodyear argued below that the collateral source rule should not apply because the benefits Sheffield received were attributable to her on the job injury, not to the alleged discrimination and retaliation. Sheffield responded that she was not seeking back pay from Goodyear for the time off work she took before her demotion, so any benefits she received up to that time would not be relevant. She said she was seeking back pay only after her demotion in May 2003, because she intended to prove that she would have been back at work full time after May if she had not been demoted, as retaliation, to a job that she was physically unfit to perform.[16] The trial court agreed with Sheffield and excluded the evidence because "the demotion really was the event that precipitated the later receipt of Workers' Comp and Unemployment Insurance."[17]

Goodyear merely declares that the facts of this case are the same as in Wheeler. The record, however, supports the trial court's ruling. Dr. Kuechle testified that but for the demotion, Sheffield could have gone back to work as

[16] VRP (October 24, 2007) at 10-12.
[17] VRP (October 25, 2007) at 64.

store manager with an accommodation of assistance to lift more than 30 pounds.[18] We conclude that the trial court did not abuse its discretion by excluding the evidence under the collateral source rule.

Vocational Report

Goodyear contends the trial court erred by redacting the records of vocational counselor Easley to remove statements Easley obtained from physicians to the effect that Sheffield was medically unstable in 2004 and 2005 when she claimed to be ready to return to work. Goodyear argues the court erred in characterizing the redacted information as hearsay. The record on appeal contains only the redacted versions of Easley's records. Goodyear's claim that the redacted material should have been admitted, therefore, cannot be reviewed.

Exhibits after the Evidence Closed

Goodyear contends the trial court erred in permitting plaintiff to supplement the exhibits containing Dr. Taylor's medical charts after the evidence closed, without a stipulation as to the admissibility of the supplements. Goodyear introduced part of Dr. Taylor's medical charts into evidence earlier. Sheffield did not object to the exhibit being incomplete so long as the complete chart was eventually submitted. With that agreement, the court admitted the

[18] Clerk's Papers at 1235-36 (Dr. Kuechle's videotaped deposition which was shown to the jury.) See VRP (November 1, 2007) at 6.

excerpt. Goodyear's counsel remarked, "I am happy to have Mr. Johnson supplement with anything that he thinks is left out."[19] When Sheffield offered the remainder of the chart at the end of trial, Goodyear objected on grounds of authenticity and lack of foundation. The trial court gave Goodyear the opportunity to review the remainder of the records to determine whether any of them appeared not to be authentic.[20] But counsel did not find anything questionable.

Considering the sequence of events at trial in which Goodyear agreed that supplementation would be allowed, we find no abuse of discretion in the trial court's decision to admit the entire chart.

Claim Of Retaliation

Sheffield's retaliation claim invoked RCW 49.60.210(1). The statute provides that "It is an unfair practice for any employer…to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices" forbidden under RCW ch. 49.60. To establish a prima facie case of retaliation, an employee must show that (1) he or she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's activity and the employer's adverse action. Estevez v. Faculty Club of University of Washington, 129 Wn. App. 774,

[19] VRP (October 30, 2007) at 359-60.
[20] VRP (November 6, 2007) at 124-28.

797, 120 P.3d 579 (2005).

Here, there is no dispute that an adverse employment decision was made: Sheffield was demoted. Goodyear contends that Sheffield's claim of retaliation was insufficient as a matter of law because at the time when she complained about Johnson's anti-gay comments, the legislature had not yet made sexual orientation a protected category under RCW ch. 49.60 and therefore the practice she was opposing when she complained about Johnson was not a practice forbidden by the statute.

To show that she engaged in a "statutorily protected activity," Sheffield needed only to prove that her complaints went to conduct that was at least arguably a violation of the law. She did not need to prove that the behavior she was complaining about—the anti-gay remarks—would actually violate the law against discrimination. Estevez, 129 Wn. App. at 798; Little v. Windermere Relocation, Inc., 301 F.3d 958, 969 (9th Cir. 2002); see also Moyo v. Gomez, 40 F.3d 982, 984 (9th Cir.1994).

Sheffield was mistaken in her belief that the practice she was opposing – the toleration of anti-gay remarks — was forbidden by RCW ch. 49.60. But as a resident of Seattle where discrimination on the basis of sexual orientation was actually illegal at the time, she could have reasonably believed that an unlawful employment practice had occurred. Under Estevez, this was sufficient to allow

the claim to go to the jury.

Goodyear argues that the Seattle anti-discrimination ordinance is inconsistent with state law and therefore ultra vires. Goodyear raises this argument for the first time on appeal, and we decline to address it. RAP 2.5(a).

Goodyear also contends Sheffield failed to prove the causation element of a retaliation claim—that Goodyear decided to demote her because of her complaints about the anti-gay remarks. Goodyear contends the evidence shows that the only reason for demoting Sheffield was her own financial misconduct with respect to the improper invoice for the engine she purchased, and other matters relating to bookkeeping.

We review the jury's verdict under the sufficiency of the evidence standard. Canron v. Fed. Ins. Co., 82 Wn. App. 480, 486, 918 P.2d 937 (1996). The jury was instructed to determine whether "a substantial factor in the defendant's decision to demote her was her opposition to what she reasonably believed to be discrimination." Jury Instruction No. 12. The jury heard evidence that Reich asked Sheffield if she would drop her complaint and come back to work with Johnson. When she refused, Reich said "there is nothing I can do for you," and a few days later he demoted her. And the defendants' stated reason for demoting Sheffield changed over time, focusing at first on Johnson's uncorroborated allegations of "inappropriate kissing" by Sheffield and then

shifting to criticism of Sheffield's purchase of the engine. Sheffield elicited testimony from Reich that the alleged misconduct with the engine was minor and that it did not actually violate company policy.[21] Under the circumstances, a reasonable juror could believe that it was Sheffield's complaint about Johnson's anti-gay remarks that substantially motivated the company to demote her.

We conclude the evidence supporting the retaliation claim was sufficient.

Failure To Accommodate

Jury Instruction No. 6 set forth the five elements of Sheffield's claim that Goodyear failed to reasonably accommodate her disability. The instruction stated, "It is not disputed that Ms. Sheffield has proven the first two of these propositions. Therefore, if you find from your consideration of all of the evidence that the third, fourth and fifth of these propositions has been proved, then your verdict should be for Ms. Sheffield on this claim." The first two propositions were: (1) That she had a disability; and (2) That Goodyear was aware of the disability.

Goodyear contends that both propositions were disputed and should have been given to the jury to decide.

[21] VRP (October 30, 2007) at 503-04; VRP (October 31, 2007) at 600-03.

When the court discussed Instruction No. 6 with the parties, Goodyear seemed to agree that there was no real dispute that Sheffield had a disability and Goodyear was aware of it.[22] Arguably, Goodyear waived review of the issues now raised on appeal. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). But considering the instructional issues as if they were properly preserved, we find no error. There was overwhelming evidence that Sheffield had back pain that limited her ability to lift heavy tires or to stand in one place for a long time. And the issue of Sheffield's disability had already been addressed in the summary judgment phase below. In her response brief on summary judgment, Sheffield stated that she sought treatment for her back injury and, when advised by her doctor to take time off work, informed Reich.[23] When Reich took no formal action, Sheffield continued working. In February 2003, her doctor again requested that she take time off for treatment and evaluation of her back injury. Sheffield notified Reich. In its reply brief, Goodyear did not contest the fact that Sheffield "notified" Reich of her injury.

Goodyear claims that Easley, the vocational counselor, was unable to ascertain "the nature and extent" of Sheffield's ability to return to work, and accordingly Goodyear could not be charged with that knowledge. It is not clear where such evidence can be found in the record. But in any event, an

[22] VRP (November 6, 2007) at 97.
[23] Clerk's Papers at 302.

employer's notice of an employee's disability is not determined by the "nature and extent" of the disability. The correct rule is that once given notice, the employer has a duty to inquire regarding the nature and extent of the disability, and then take positive steps to accommodate it. The employee's duty is to cooperate with the employer's efforts by explaining her disability and qualifications. Goodman v. Boeing Co., 127 Wn.2d 401, 408-409, 899 P.2d 1265 (1995). Here, it is undisputed that several doctors provided information about restrictions on Sheffield's physical ability to work and that Goodyear was aware of this information. Thus, the trial court did not err in instructing the jury that Sheffield had already proven she had a disability and Goodyear was aware of it.

Goodyear also challenges the trial court's refusal to give several jury instructions proposed by the defense pertaining to accommodation of a disability. The court refused to give these instructions because they were stated in the negative. A trial court's refusal to give a jury instruction is reviewed for abuse of discretion. Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Giving jury instructions phrased in the negative can be confusing and misleading. See Rickert v. Geppert, 64 Wn.2d 350, 355-56, 391 P.2d 964 (1964). Goodyear has not shown that the court's reasoning rested on untenable grounds. The court did not abuse its discretion in rejecting these proposed

instructions.

One of the elements of a claim of failure to accommodate is that the employee is qualified to perform the essential functions of the job in question. Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 145, 94 P.3d 930 (2004). Instruction No. 6 put this issue before the jury by advising them that Sheffield had the burden to prove that she "was able to perform the essential functions of the job in question with reasonable accommodation." Goodyear contends that Sheffield failed to prove this element as a matter of law because Dr. Taylor sent a certification to Employment Security in June 2006 that Sheffield was completely unable to work from August 2003 through June 2006. Goodyear contends that Sheffield is judicially estopped by the doctor's letter from asserting that she would have been able to work with reasonable accommodation during the time period of August 2003 through June 2006. As a result, Goodyear argues, the claim of failure to accommodate should not have gone to the jury.

The controversy over Dr. Taylor's certification recurred throughout the trial and was one basis for Goodyear's motion for judgment as a matter of law at the end of trial. The trial court admitted the document over Sheffield's objection and allowed Goodyear to argue it to the jury. Goodyear did argue it: "She could not work at all. He certified that. What, in light of this unambiguous statement, should Goodyear have been doing to put a person back to work who has been

certified as unable to work?"[24]

Judicial estoppel is an equitable doctrine that precludes a party from taking one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). Sheffield testified that she did not see Dr. Taylor's certification after he completed it. And there was other evidence from which the jury could conclude that Dr. Taylor meant only that Sheffield was incapable of handling the job to which she was demoted, and did not consider whether reasonable accommodation would have enabled her to work during the previous three years as store manager. Under these circumstances, Sheffield did not take a clearly inconsistent position and the trial court did not err in letting the jury consider the weight of the evidence rather than using the doctrine of judicial estoppel to bar the claim completely.

On the issue of whether Sheffield was able to perform the essential functions of the job in question with reasonable accommodation, Goodyear also makes a challenge to the sufficiency of the evidence, arguing that Sheffield unreasonably sought to be completely excused from central job responsibilities of the position of store manager, such as lifting an average tire. The jury heard considerable testimony on this issue, including testimony that the average tire is

[24] VRP (November 6, 2007) at 180.

actually not all that heavy. Goodyear's description of the store manager's job stated that the primary function is to oversee and manage the other employees and the store without any heavy physical labor. All the doctors who treated Sheffield ultimately opined that she could perform the job of store manager with an accommodation for her lifting restriction. This evidence was sufficient to support a determination that Sheffield was qualified to perform the essential functions of the store manager position.

Personnel File

The jury awarded Sheffield $500 in damages caused by Goodyear's delay in granting her access to her personnel file, a right established by RCW 49.12.240 and .250. Goodyear contends submitting the claim to the jury was error because Sheffield produced no proof that any damage occurred. This award is supported by the evidence that Sheffield was put to the inconvenience of hiring counsel to enforce her right. It will not be disturbed.

Excessive Damages

Goodyear argues that the award of damages was excessive. We need not address this claim because there will be a new trial on damages.

Attorney Fees

In an employment discrimination case, a prevailing plaintiff is entitled to recover reasonable attorney fees and costs from the defendant. RCW 49.

60.030(2). Sheffield has prevailed against Goodyear's cross-appeal and is entitled to reasonable attorney fees and costs on appeal for responding to that cross-appeal, subject to compliance with RAP 18.1.

Becker, J.

WE CONCUR:

Dwyer, A.C.J.

Grosse, J.